



August 26, 2002

Mr. David M. Berman
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
500 North Akard, Suite 1800
Dallas, Texas 75201

OR2002-4760

Dear Mr. Berman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166975.

The Town of Cross Roads (the "town"), which you represent, received a request for "all correspondence mail and email concerning any development issue sent by or from or received by" a named individual. You contend that the information in question is not public information for purposes of the Public Information Act (the "Act"). In the alternative, you claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claims and reviewed the submitted representative sample of information.¹

We begin by addressing the applicability of the Act to the requested information. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it."

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You inform us that the individual in question is a town citizen who has provided assistance to the town in understanding and resolving complex issues surrounding a proposed development and the creation of certain municipal utility districts. The requested information consists of correspondence prepared by this individual in the course of providing assistance with the official business of the Town Council. You inform us that the individual "may act as an agent for the Town in serving on an ad hoc committee and in providing assistance to the Town Council."

Pursuant to section 552.303(c) of the Government Code, on July 25, 2002 this office sent a notice to you via facsimile requesting that you provide further information regarding the relationship between the town and the individual at issue. In your response of July 30, 2002, you advise that this individual, though not a public official or employed by the town, was "appointed to an ad hoc committee" to assist and advise the Town Council regarding the benefits, detriments, and procedural requirements of municipal utility districts. You further assert, however, that the individual presently has no authority to act on behalf of the town, that "the issues that relate directly to the municipal utility district no longer require the assistance of any committee or any citizens," and that the work of the committee is not "officially recognized" by the Town Council.

Where a third party has prepared information on behalf of a governmental body, the information is subject to the Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 at 2 (1990). Moreover, if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to disclosure. Open Records Decision No. 518 at 3 (1989). In this case, the individual at issue was appointed to a committee created by the Town Council to carry out a specific delegated task. The task assigned to the committee pertained to the transaction of the town's official business. You state that in the course of performing that task, the individual acted as an agent of the town. You inform us that the task of the committee is now concluded, although the committee has not been dissolved officially by the Town Council. Based on your representations, we find that, during the period of time between the date of the appointment of the committee and the date the Town Council determined the committee's work was concluded, the individual at issue performed work on behalf of the town in connection with official business. We further find that the individual acted as the town's agent until this date. In part, the present request concerns information assembled or maintained during the time the individual was acting as the town's agent. Accordingly, we find that only the information collected or assembled by the individual at issue during this time constitutes public information subject to disclosure under the Act.

Because we determine that such information is subject to the Act, we next address your claim that this information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you state that the requestor is acting on behalf of a developer, Cross Oaks Ranch, who has filed suit in the 211th District Court of Denton County. You inform us that by this suit, the developer seeks to compel the depositions of the individual at issue here and another individual pursuant to the developer's investigation of a claim against these individuals for alleged tortious interference with business relations. Pursuant to section 552.303(c) of the Government Code, on August 8, 2002 this office sent an additional notice to you via facsimile requesting that you provide a copy of the pleadings in Cause No. 2002-211, styled *In re Cross Oak Ranch, Ltd.* In response, you provided the citation and Cross Oak Ranch's verified petition to depose two persons, including the individual at issue, as well as some related correspondence. Upon review of the citation and petition you have provided, we find that the lawsuit was filed against the persons in question individually. We note that the town is not named as a defendant in this litigation. Furthermore, you have informed us that the individual in question is not an officer or employee of the town, and that the town is not providing legal representation to this individual in this matter. Thus, we determine that the information at issue does not relate to litigation in which the town, or an officer or employee of the town, is or may be a party. Accordingly, the information may not be withheld pursuant to section 552.103 of the Government Code. As you raise no other exceptions to disclosure, we determine that the information at issue must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'DRS', followed by a long horizontal flourish.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 166975

Enc: Submitted documents

c: Mr. Thomas Wilson
3912 White Tail Drive
Denton, Texas 76208
(w/o enclosures)